SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK
Justice

TRIAL/IAS PART 51

STEPHEN PETRILLO,

Plaintiff(s),

- against -

NICHOLAS GUADAGNO and
BRONX HYUNDAI, LLC.,

Defendant(s).

INDEX NO. 20865/05

MOTION SEQUENCE
NO. 001, 002

MOTION SUBMISSION
DATE: 10/09/07

The following papers read on this motion:

Notice of Motion..... 1
Notice of Cross Motion..... 2
Affirmation in Opposition..... 3
Affidavit in Reply..... 4
Affirmation in Reply..... 5
Memorandum of Law..... 6

Motion by defendants Guadagno and Bronx Hyundai, LLC for an order dismissing the complaint or in the alternative directing plaintiff Stephen Petrillo to provided certain responses to defendants' second set of interrogatories is denied. Cross-motion by plaintiff Stephen Petrillo for summary judgment is granted to the extent that plaintiff is awarded judgment against defendants in the amount of $35,279.76 plus interest, and so much of the defendants' counterclaim as seeks to recover against plaintiff for a percentage of the profits on automotive products

sold through defendant Bronx Hyundai is dismissed.

Plaintiff Stephen Petrillo, and defendants Nicholas Guadagno and Bronx Hyundai LLC are parties to a written agreement dated August 22, 2002 (the Agreement). The Agreement recites that Petrillo invested certain sums in an automobile dealership owned by defendant Hyundai LLC. Nicholas Guadagno is the principal member of Bronx Hyundai and a party to the Agreement. Plaintiff alleges that defendants Bronx Hyundai and Guadagno have breached the Agreement, and that he has sustained damages in the amount of $35,279.76.

The main provisions the Agreement recite that in exchange for Petrillo's advance of $125,000 to Guadagno, Bronx Hyundai would provide Petrillo with 10% of the net profits of the dealership, family health benefits and a demonstration vehicle. After one year Petrillo had the option of terminating the Agreement in which event he would receive $125,000 or 10% of the fair market value of Bronx Hyundai.

The court takes note that the written Agreement and the allegations of the parties diverge in certain respects. First, defendant Guadagno avers that the Agreement provides for a "salary" for plaintiff Petrillo of $1,000 per month and provides for Petrillo to pay Guadagno a share of profits for the sale of certain automotive products such as vin number etchings and warranties through Bronx

Hyundai. Neither provision appears in the Agreement. The following clause, however, does appear:

> In further consideration of the investment herein, BRONX HYUNDAI, LLC hereby grants to *Diversified Automotive Concepts, Inc.* the exclusive right to market its automotive products at the dealership location. This right shall exist only until this Agreement is terminated or until all payments are made to Petrillo as set forth hereinabove, whichever is longer (emphasis supplied).

Although the foregoing clause (hereafter the automotive products clause) provides Diversified Automotive Concepts, Inc. with exclusive rights to market automotive products at the dealership location, Diversified is not a party to the Agreement. Neither is it a party to this suit, notwithstanding that defendants are seeking payment for their share of profits from the automotive product sales. Rather Guadagno attempts to enforce Diversified's obligations to share profits, if any, against plaintiff Petrillo.

Guadagno also alleges that there is an additional oral agreement for the sale of automotive products. He alleges that he introduced Petrillo to certain dealerships, and that he and Petrillo entered into an oral agreement regarding the sale of automotive products at those locations, to wit, Garden City Saab/Lincoln Mercury, Oyster Bay Nissan and Major Nissan (hereafter referred to as "additional dealerships").

Petrillo acknowledges an oral agreement, but alleges that it was with Diversified Automotive Concepts, Inc. In support he offers evidence that all payments were made by Diversified, and notes that the written Agreement explicitly gave such rights to Diversified, not Petrillo personally. Petrillo also avers that Guadagno has been paid in full.

Addressing the cross- motion for summary judgment first, plaintiff offers the Agreement and an affidavit in support. Petrillo's affidavit avers that he is still owed $3,500 from his initial investment of $175,000 (increased from $125,000 by a written undated Amendment), and an additional sum based upon an Amendment to the written Agreement.

Regarding the Amendment, Petrillo alleges that he is owed a percentage of certain loan payments made by Bronx Hyundai. He avers that Guadagno advised him that Guadagno would personally provide the funds to pay the cost of purchasing the dealership beyond the moneys Petrillo advanced. Instead Guadagno borrowed from two additional investors, Automotive Professionals Inc. and Heritage TPA, and repaid those loans out of dealership earnings. Petrillo alleges that the reduction in profits due to the extra loan expenses reduced his profit percentages in violation of the Agreement and Guadagno's representations to him. Therefore the written Amendment provides for an increased personal

guarantee by Guadagno for a percentage of the loan repayments to Heritage and API out of the dealerships profits. He alleges that he is owed $3,500 on the original loan and $31,779.76 on the loans repaid by Bronx Hyundai to API and Heritage.

Defendants offer no evidence to refute Petrillo's claims regarding the written Agreement and Amendment. They aver only that Bronx Hyundai never made a profit. This unsupported statement is insufficient to create a factual issue. In response to plaintiff's prima facie proof of entitlement to judgment as a matter of law, defendants' burden was to lay bare their proofs to create a factual issue. Defendants' "unsubstantiated allegations or assertions are insufficient' for this purpose" (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). Accordingly, judgment is granted to plaintiff.

With respect plaintiff's additional application to dismiss the counter-claim, the written Agreement provides rights to sell automotive products at Bronx Hyundai only to Diversified Automotive Concepts, Inc. Corporations such as Diversified "have a legal existence separate from that of their officers and shareholders, even when the corporation has a single shareholder who of necessity dominates the corporation" (*Kok Choy Yeen v. NWE Corp.*, 37 AD3d 547, 549 [2d Dept 2007]). Accordingly, so much of the counterclaim as is against Petrillo for

automotive products sales through Bronx Hyundai is dismissed. The plain unambiguous language of the Agreement gives such rights solely to Diversified (*see, Franklin Apartment Associates v. Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2d Dept 2007]).

Regarding products sold to the additional dealerships, and the oral agreement, there is no admissible evidence to support the version proffered by either party and thus factual issues exist. The supporting documentation offered by plaintiff with regard to payments by Diversified appears to be solely related to Bronx Hyundai, and thus lends no support to advance the claim regarding the additional dealerships. With regard to plaintiff's defense of the Statute of Frauds, without establishing the terms of the oral agreement it cannot be determined whether it could be performed within a year. Accordingly, the counterclaim concerning sales of automotive products to the additional dealerships must await resolution of factual issues.

Turning to the main motion, defendants seek answers to interrogatories numbered five, eleven and thirteen in their Second Set of Interrogatories. This issue, regarding outstanding interrogatory responses due defendants, was resolved at a court conference which resulted in a so ordered stipulation dated May 7, 2007. Such stipulation did not reserve the right to move regarding

interrogatories numbered eleven and thirteen, nor was plaintiff directed to respond thereto. With respect to interrogatory number five, in relevant part, plaintiff's answer reads as follows: "specific information concerning warranty cancellations is not contained in the books or records of the Plaintiff, nor his corporation. A search has been made for same".

Where claim is made that requested documents do not exist, the requesting party "is entitled to a detailed statement, made under oath, by an employee or officer with direct knowledge of the facts concerning the past and present status of the disputed documents" (*Wilensky v. JRB Marketing & Opinion Research*, 161 AD2d 761, 763 [2d Dept 1990], *accord, Mercado v. St. Andrews Housing Development Fund Company*, 289 AD2d 148 [1st Dept 2001]; *Longo v. Armor Elevator, Co.*, 278 AD2d 127 [1st Dept 1990]; *Abbadessa v. Sprint*, 291 AD2d 363 [2d Dept 2002]). Plaintiff has submitted such an affidavit in opposition to defendants' motion, and thus the motion is denied in its entirety. It is noted however, that plaintiff is precluded from producing warranty cancellations at trial (*supra*).

Dated: 12/31/07

J.S.C.